86-317

Supreme Court, U.S.
FILED
AUG 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES E. N. ROSENE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN J. MURPHY
59 Grasso Plaza
Suite 112
St. Louis, Missouri 63123
(314) 638-9191
Attorney for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. Whether The Court of Appeals erred by overlooking the established principle that the Government is estopped to deny FBI agents' authority to enter into a contract with Rosene when the agents affirmatively misled Rosene into an agreement to apprehend criminals?

2. Whether this Court should grant certiorari to resolve a conflict in the circuits over the law of estoppel as applied to the Government?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Statement	2
Reasons for Granting the Writ	4
I. The Court Of Appeals Erred In Granting The United States' Motion To Dismiss Because The Government Is Estopped To Deny The Contracting Authority Of Its Agents Based On Their Affirmative Misconduct. Thus, An Issue Of Material Fact Exists For The Claims Court To Try	4
II. Because There Is Confusion In The Lower Courts Over The Application Of Estoppel To The Government, This Court Should Grant Certiorari To Resolve The Issue With Finality	7
Conclusion	8
Appendix:	
A. Opinion Of Court Of Appeals For The Federal Circuit Dated March 3, 1986	A-1
B. Judgment Of Court Of Appeals Dated March 3, 1986	A-6

C. Order Of Court Of Appeals For The Federal Circuit Denying Rehearing Dated May 22, 1986 ..... A-7

D. Judgment Of The United States Claims Court Dated June 28, 1985 ..... A-8

E. Order Of The United States Claims Court Dated June 27, 1985 ..... A-9

TABLE OF AUTHORITIES

Page

Cases:

Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam) . 6,7

Adickes v. Kress & Co., 398 U.S. 144 (1970) 4

Moser v. United States, 341 U.S. 41 (1951)..... 4

United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979)..... 4,6,7

United States v. Wharton, 514 F.2d 406 (9th Cir. 1975) . 7

United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973) 5,7

United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970) 7

Secondary Sources:

Annot., 27 A.L.R. Fed. 702 (1976) 4

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHARLES E. N. ROSENE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
For the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

Charles E. N. Rosene, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Federal Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reproduced in Appendix A of this petition, *infra,* A-1. The Order of the Claims Court is also reproduced in Appendix E of this petition, *infra,* A-9.

JURISDICTION

The judgment of the Court of Appeals (App. B, *infra*, A-6) was entered on March 3, 1986. A petition for rehearing was denied on May 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

No constitutional provisions or statutes are involved in this petition.

STATEMENT

Charles E. N. Rosene brought an action against the United States of America in the United States Claims Court on August 9, 1984. In his complaint, Rosene alleged that special agents of the Federal Bureau of Investigation had offered a sum of money to compensate Rosene for assisting in the apprehension and conviction of individuals who planned to steal a nuclear submarine from the United States Navy. The United States moved to dismiss the suit for failure to state a claim upon which relief could be granted. The Claims Court, Moody R. Tidwell, J., granted that motion.

The relevant facts leading to the filing of Rosene's petition are as follows. In August, 1978, Rosene was approached by an individual who revealed a plot to steal a nuclear submarine belonging to the United States Navy. Rosene promptly reported the plot to the Police Department of the City of St. Louis, Missouri. The police subsequently reported that information to the Federal Bureau of Investigation (FBI).

Two special agents of the FBI, Michael Haggard and Gary Brewer, interviewed Rosene and asked for his assistance in revealing the plot, apprehending and convicting the individuals who planned to steal the submarine. As an inducement for

assistance, those agents promised to pay Rosene the sum of two hundred and fifty thousand ($250,000.00) dollars, free from taxes. The agents represented to Rosene that they had authority to bind the United States Government to an agreement.

At a later date, Haggard and Brewer produced another person who they claimed was their superior and an agent of the FBI. That agent ratified the offer made by Haggard and Brewer and reiterated the terms of the offer to Rosene.

Rosene accepted the government's offer. He met with the individuals planning the theft and played a role in their arrest. Rosene testified at the trial of the conspirators and they were later convicted. After performing these services at the request of the United States government, Rosene asked for the $250,000.00 in compensation that the government had promised him. The United States, however, refused to tender payment. Thus, Rosene filed suit in the United States Claims Court.

After Rosene filed his complaint, the United States moved to dismiss the suit based on the affidavits of FBI agents. Those affidavits stated that none of the agents involved in the case had the authority to bind the government to a contract. The Claims Court granted the government's motion. Subsequently, Rosene appealed the case to the United States Court of Appeals for the Federal Circuit. The appeals court affirmed the lower court's order and ruled that there was no issue of fact as to the contracting authority of Haggard and Brewer. (*See* App. A, *infra,* at A-5).

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning federal officials who contract with citizens on behalf of the government and who also assure those citizens of their authority to bind the government. Should this Court affirm the opinion of the court of appeals that citizens assume all risk that officials with whom they deal have authority to contract, the doors would be opened for subordinate government employees to expose citizens to fraud in the inducement of contracts. Thus, the Court should initially note that the standard of review for a decision granting a motion to dismiss for failure to state a claim mandates that the Court view the underlying facts in Rosene's complaint in the light most favorable to him. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-159 (1970).

I. The Court Of Appeals Erred In Granting The United States' Motion To Dismiss Because The Government Is Estopped To Deny The Contracting Authority Of Its Agents Based On Their Affirmative Misconduct. Thus, An Issue Of Material Fact Exists For The Claims Court To Try.

The government is estopped to disavow statements and conduct of government contracting officers, made in the performance and within the apparent scope of their duties, when a government contractor has relied on them to his detriment. Annot., 27 A.L.R. Fed. 702, 729 (1976). Furthermore, elementary fairness requires that if a plaintiff justifiably relies on information from the government and is injured by following a subsequent course of action based on that reliance, the plaintiff will prevail against the government. *See e.g., Moser v. United States,* 341 U.S. 41, 46-47 (1951).

Estoppel is an equitable remedy that the Court must apply when required by justice and fair play. *See United States v. Ruby Co.*, 588 F.2d 697, 702-05 (9th Cir. 1978), *cert. denied* 442 U.S. 917 (1979). When applying estoppel to the government,

the Court must weigh the tendency of the government's wrongful conduct to work a serious injustice against the interest of the public not to be unduly damaged by the imposition of estoppel. *Id.* at 703 (quoting *United States v. Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973)).

In the instant case, elementary fairness clearly requires that Rosene be given the opportunity to prevail against the government. Government agents represented to Rosene that they had the authority to contract on the behalf of the government and that the government would pay Rosene for his services. Rosene relied on those representations to risk physical harm to himself by assisting in the arrest of criminals. Rosene is not a lawyer: he had no idea of whether or not the agents had the requisite authority to contractually bind the United States. Rosene is merely a law abiding small businessman who risked his life to serve his country. Rosene was, however, induced to follow this course of action by possibly fraudulent statements made by agents of the United States government. Thus, Rosene should be entitled to prevail against the government for the compensation he was promised.

To affirm the judgment of the court of appeals would work an injustice not only against Rosene, but against the general public as well. To allow agents of the United States to make false statements of authority and fraudulent promises to unsuspecting citizens and to subsequently allow the government to go unpunished creates incentives for agents to act unscrupulously. In the future, if the lower court's decision is affirmed, government employees will no doubt have carte blanche to bargain with citizens using the vast resources of the United States government as leverage. Those agents can nevertheless renege on the bargains by relying on the erroneous rationale of the court of appeals. Considering the size of the federal government, the amount of abuse will be enormous.

Furthermore, the application of estoppel in the instant case will not damage the public. There may be some unscrupulous

individuals who will try to take advantage of the government, but that danger is far outweighed by the fact that imposition of estoppel in the present cause will induce the government to train its employees to be more prudent when dealing with citizens. Therefore, imposing estoppel in the present case would a) avoid injustice to Rosene; and b) induce government employees to behave more carefully.

The elements of estoppel are: (1) The party to be estopped must know the facts; (2) The party must intend that his or her conduct be acted on; (3) The party asserting estoppel must be ignorant of the true facts; and (4) He or she must rely on the conduct of the party to be estopped to his or her injury. *Ruby,* 588 F.2d at 703. In the instant case, all of these factors concur. Haggard and Brewer knew whether or not they could contract with Rosene and they intended for Rosene to act on their promise of $250,000.00. Rosene, on the other hand, had no idea of the agents' contractual authority and risked his life based on their representations. Thus, the government should be estopped to deny the authority of its agents and the court of appeals erred by not addressing this issue.

The Court has approved of this line of analysis. For instance, in *Schweiker v. Hansen,* 450 U.S. 785 (1981) (per curiam), the Court implied that estoppel would be applied against a government agent if the agent's representations caused a citizen to take action. *Id.* at 789. Thus, the Court seems to endorse estoppel when the "affirmative misconduct" element is present. *Id.* Justice Marshall noted that the Court should address the estoppel issue "in a comprehensive fashion" to provide "guidance to the lower courts in an area of law that . . . is far from settled." *Id.* at 791-92 (Marshall, J., dissenting). By granting Rosene's petition, the Court has an excellent opportunity to provide the needed guidance and to also give Rosene the fair trial he deserves.

II. Because There Is Confusion In The Lower Courts Over The Application Of Estoppel To The Government, This Court Should Grant Certiorari To Resolve The Uncertainty With Finality.

In *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970), the United States Court of Appeals for the Ninth Circuit held that the federal government was not entitled to immunity from equitable estoppel. *Id.* at 103. Later, however, the circuit developed a balancing test for determining whether estoppel is applicable to the government. Thus, estoppel is available against the government if the government's wrongful conduct threatens to work a serious injustice and if the public interest would not be unduly damaged by the imposition of estoppel. *United States v. Lazy FC Ranch,* 481 F.2d 985, 989 (9th Cir. 1973). The same court also held that estoppel may be applied against the government even when acting in its sovereign capacity. *United States v. Wharton,* 514 F.2d 406, 411 (9th Cir. 1975). Finally, the Ninth Circuit has held that estoppel may be applied to the government if the application is based on affirmative misconduct. *United States v. Ruby Co.,* 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied,* 442 U.S. 917 (1979). Thus, the development of the law of estoppel in the Ninth Circuit is in direct conflict with the law of the Federal Circuit on the same matter. Indeed, the Federal Circuit neglected to even acknowledge the doctrine in a case where Justice calls for estoppel to be applied to the government, i.e. the present case.

The Ninth Circuit has concluded that this Court has rejected the contention that under no circumstances may estoppel lie against the government. *Ruby,* 588 F.2d at 702. This conclusion is buttressed by the Court's dicta in *Schweiker v. Hansen,* 450 U.S. 785, 789 (1981) (per curiam). Nevertheless, the United States Court of Appeals for the Federal Circuit's opinion in the instant case totally ignores the validity of this conclusion. Therefore, the Court should grant certiorari in the present case to definitively resolve the law of estoppel among the lower courts.

CONCLUSION

WHEREFORE, the petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen J. Murphy
59 Grasso Plaza, Suite 112
St. Louis, Missouri 63123
(314) 638-9191

Attorney for Petitioner

August, 1986

CERTIFICATE OF SERVICE

Three (3) copies of Petitioner's Petition For Writ Of Certiorari were mailed to Eileen P. Fennessy, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Todd Building, Washington, D.C. 20530 on August 19th, 1986.

Stephen J. Murphy

APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2700

Charles E. Rosene,
Appellant,

v.

The United States,
Appellee.

Decided: March 3, 1986

Before RICH, NEWMAN, and ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

DECISION

Charles E. Rosene (Rosene) appeals from the June 27, 1985 Order of the United States Claims Court which granted the Government's Motion to Dismiss pursuant to Rule 12(b)(4) of the Rules of the United States Claims Court (RUSCC). We *affirm.*

OPINION

Rosene filed a complaint in the Claims Court against the United States for $250,000, alleging that said sum was due and owing on the basis of an implied in fact contract between himself and the Federal Bureau of Investigation. Rosene's complaint alleged that this purported contract was formed when FBI Special Agents Haggard and Brewer promised that the FBI would pay him that sum for assisting in the investigation, apprehension and trial of certain individuals suspected of conspiring to commit a crime. The complaint further states that these agents represented that they had authority to enter into such an agreement, and that it was ratified by the agents' superior.

The Government, in response to Rosene's complaint, filed a Rule 12(b)(4) Motion to Dismiss, accompanied by declarations from Haggard, Brewer, Klager (Special Agent in Charge of the Office and supervisor of Haggard and Brewer during the relevant period), and Special Agent Baugh (Unit Chief, Contract Review Unit, during the relevant period). Agents Haggard and Brewer each averred that he had not promised Rosene $250,000, that he had not represented to Rosene that he had authority to bind the Government, and that he never possessed a contracting officer's warrant or authority to bind the Government during his period of employment.

Agent Klager stated in his declaration that he had not promised or approved a $250,000 payment to Rosene for assisting the FBI, that he had not represented to Rosene that he had authority to bind the Government or to ratify promises made by his subordinates, and that at no time during his employment did he or his subordinates possess a contracting officer's warrant or authority to bind the Government.

Agent Baugh, whose unit was responsible for processing standard FBI service contracts, stated[1]:

> At no time do I recall having reviewed, approved or ratified a contract on behalf of the FBI with Charles E. Rosene. To the best of my knowledge, the FBI has never entered into a contractual relationship with Charles E. Rosene and a review of our contract records indicates no such contract exists.

The Claims Court rules provide that if matters outside the pleading are presented to and not excluded by the court, a motion under Rule 12(b)(4), RUSCC, shall be treated as one for summary judgment and disposed of as provided in Rule 56. Rule 56(e), RUSCC, states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

It is well established that the Government cannot be bound by the unauthorized acts of its agents. *Schweiker v. Hansen,* 450 U.S. 785, 788 (1981), *reh'g denied,* 451 U.S. 1032 (1982); *Federal Crop Insurance Corp. v. Merrill,* 332 U.kS. 380, 384 (1947). Where the Government is alleged to be a party to a contract, a threshhold issue is whether the official or officials purporting to bind the Government by contract had the authority

---

[1] Rosene's Motion to Strike the Declaration of William Baugh, alleging it was not made on personal knowledge (*see* Rule 56(e), RUSCC), was properly denied by the Claims Court. Further, Baugh's declaration was merely cumulative of the declarations of Haggard, Brewer and Klager that they did not possess contracting authority so that any error in denying Rosene's motion would be harmless.

to do so. *Radioptics, Inc. v. United States,* 621 F.2d 1113, 1123 (Ct. Cl. 1980); *Maimon v. United States,* 219 Ct. Cl. 684, 687 (1979). This court's predecessor stated in *Yosemite Park and Curry Co. v. United States,* 582 F.2d 552, 558 (Ct. Cl. 1978), that "[o]ne who purports to contract with the United States assumes the risk that the official with whom he deals is clothed with the actual authority to enter into the contract alleged . . . ."

In responding to the Government's motion, required under the court's rules to be treated as one for summary judgment, Rosene was obligated to show there was a genuine issue of fact as to the contracting authority of those who promised that the FBI would pay him. Rosene's answer to the motion was general and conclusory in nature, failing to set forth any facts which would indicate or imply real or apparent contracting authority was held by the agents with whom he had dealings. An affidavit by Rosene, presumably filed with the answer,[2] contains only the statement that Haggard, Brewer, and an unknown third person promised to pay him the sum in controversy. No statement, or specific facts as required by Rule 56(e), relating to the actual or implied authority of these persons to make a binding promise for the payment of this or any other sum is set forth in the affidavit. The affidavit, while arguably sufficient to raise a genuine issue of material fact as to the intention to form a contract, is not germane to the threshhold issue of contracting authority.

Rosene was not free to rest solely on the general allegations of his pleadings when faced with the affidavits attached to the Government's motion specifically negating any contracting authority in the agents who dealt with Rosene. Rule 56(e),

---

[2] Rosene's affidavit was notarized on November 30, 1984. The Claims Court Docket Sheet does not reflect a filing date for this affidavit. For purposes of our analysis we assume this affidavit was before the Claims Court.

RUSCC; *Royal Indemnity Co. v. United States,* 371 F.2d 462, 465 (Ct. Cl.), *cert. denied,* 389 U.S. 833 (1967).

Accordingly, the Government was entitled to judgment as a matter of law, and the Claims Court was correct in granting the Government's motion to dismiss pursuant to Rule 12(b)(4). *Pacific Far East Line, Inc. v. United States,* 513 F.2d 1355, 1359 (Ct. Cl. 1975).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2700

Charles E. Rosene,
Appellant,

v.

The United States,
Appellee.

JUDGMENT

On Appeal from the United States Claims Court
In Case No(s), 409-84C
This Cause having been heard and considered, it is
Ordered and Adjudged:

AFFIRMED.

Entered by Order of the Court

/s/ Francis X. Gindhart, Clerk

Dated March 3, 1986

Issued as a Mandate: May 29, 1986
Costs against Appellant:
Printing.....$51.68
Total.....$51.68

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 85-2700

Charles E. Rosene,
Appellant,

v.

The United States,
Appellee.

Before RICH, NEWMAN, and ARCHER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,
UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT

By: Diane Frye
Chief Deputy Clerk
Francis X. Gindhart, Clerk

Date 5/22/86

cc: Mr. Stephen J. Murphy
Ms. Eileen P. Fennessy, DOJ

APPENDIX D

IN THE UNITED STATES CLAIMS COURT

No. 409-84 C

Charles E. N. Rosene

v.

The United States

JUDGMENT

(Filed June 28, 1985)

Pursuant to the order of June 27, 1985, it was held that plaintiff is not entitled to recover with the complaint to be dismissed.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed.

Frank T. Peartree
Clerk of Court

By: Debra L. Samler
Deputy Clerk

June 28, 1985

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

APPENDIX E

IN THE UNITED STATES CLAIMS COURT

No. 409-84C

Charles E. N. Rosene,
Plaintiff,

v.

The United States,
Defendant.

ORDER

(Filed: June 27, 1985)

On June 25, 1985 the court heard oral argument on Defendant's Motion to Dismiss, Plaintiff's Motion to Strike the Declaration of William Baugh and Plaintiff's Motion to Strike Defendant's Reply to Plaintiff's Answer to Defendant's Motion to Dismiss. Upon completion of argument, the court issued a ruling from the bench denying plaintiff's two motions to strike and granting Defendant's Motion to Dismiss.

Accordingly, the clerk shall dismiss the Complaint and is to enter judgment for defendant.

IT IS SO ORDERED.

Moody R. Tidwell
Judge